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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1734

W. M. GURLEY, D/B/A GURLEY OIL COMPANY,
Petitioner

versus

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent

BRIEF FOR THE RESPONDENT

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Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI
BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the Supreme Court of the State of Mississippi and the Chancery Court of the First Judicial District of Hinds County, Mississippi, are attached to to the petition for Writ of Certiorari as appendices A and B, respectively.

JURISDICTION

The respondent accepts the statement of jurisdiction contained in the petitioner's brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions quoted in the petitioner's brief, respondent supplements the following:

1. Miss. Code Ann., Section 27-65-3 (1972) provides as follows:

> Gross proceeds of sales means the value proceeding or accruing from the full sale price of tangible personal property including installation charges, carrying charges, or any other additions, to selling price on account of deferred payments by purchaser, without any deductions for freight, cost of property sold, other expenses or losses, or taxes of any kind except those expressly exempt by Miss. Code Ann. Section 27-65-29 (1972).

2. Miss Code Ann., Section 27-65-13 (1972) provides as follows:

> There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

3. Miss. Code Ann., Section 27-65-17 (1972) provides as follows:

> Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five per cent of the gross proceeds of the retail sales of the business, except as otherwise provided herein. . .
>
> Wholesale sales of beer, motor fuel, soft drinks and syrup shall be taxed at the rate of five per cent in lieu of the one-eighth of one per cent wholesale tax, and the retailer shall file a return and compute the retail tax on retail sales, but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property provided adequate invoices and records are maintained to substantiate the credit.

4. Miss. Code Ann., Section 27-65-29 (1972) provides as follows:

> The tax levied by this chapter shall not apply to the following:
>
> (e) Taxes
>
> (1) Federal retailers' excise taxes, federal tax levied on income from transportation, telegraphic dispatches, telephone conversation and electric energy.
>
> (2) The State of Mississippi gasoline tax on gasoline sold by a distributor for nonhighway use which is refunded by the Motor Vehicle Comptroller.

QUESTIONS PRESENTED

1. Whether Excise Taxes imposed by 26 U.S.C. Section 4081 may be included in the sales tax base utilized by the State of Mississippi in computing taxable "gross proceeds of sales" for the collection of sales taxes?

2. Whether or not the refusal of the State of Mississippi to permit a gasoline dealer to deduct an amount equal to the Federal Excise taxes collected from him on gasoline imported into Mississippi from the gross proceeds of sales, on which state sales tax computations are based, constitutes a violation of either (a) the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution; or (b) the Federal Government's constitutional immunity from taxation by a state?

3. Whether or not the refusal of the State of Mississippi to permit a gasoline dealer to deduct from the gross proceeds of sales, for purposes of computing Mississippi Sales Tax, an amount equal to the Mississippi gasoline excise taxes imposed upon such dealer, results in a deprivation of the gasoline dealer's property without due process of law under the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Petitioner Gurley is in the business of importing, distributing and retailing gasoline, diesel fuel and related petroleum products, with principal offices in West Memphis, Arkansas, ownership of five retail service stations in Mississippi, and consignment sales operations through several Mississippi grocery stores. Petitioner obtained

Mississippi Distributor's Permit No. 447 for gasoline, diesel fuel, kerosene or oil, and posted the necessary bond conditioned upon the full payment of all excise taxes levied on those fuels pursuant to Chapter 64, Mississippi Laws of 1946, as amended. Petitioner is likewise qualified as a distributor of gasoline with, and pays federal excise tax to, the Internal Revenue Service. During the period pertaining to this petition, and pursuant to the authority of the permits and bonds described, petitioner purchased gasoline and fuel from producers in Arkansas and Tennessee and distributed that fuel for sale at Mississippi outlets.

On January 16, 1971, petitioner filed suit to recover sales taxes in the amount of Sixty-Two Thousand Seven Hundred Eighty-Two Dollars and Fifty-Seven Cents ($62,-782.57) which he alleged were improperly collected by the State of Mississippi. The basis of petitioner's complaint was that the sales taxes were computed on a tax base which included State and Federal Excise taxes in addition to the base price of gasoline. Respondent herein cross-complained for the sales taxes not paid by petitioner.

It has been respondent's position throughout this controversy that both the State and Federal Excise taxes are legally imposed upon the distributor, that the distributor may, as a matter of business economics, raise the price charged his customers an amount sufficient to absorb his payment of the excise taxes, but that the legal incidence of both Federal and State Excise taxes is upon the distributor and that such taxes may not be collected if not paid by the distributor, from the consumer. It is respondent's position, therefore, that the amount of such taxes are no different from any other costs of the distributor's doing business, which are reflected in the price charged the ultimate consumer. Therefore, the distributor has no

right to exclude an amount equal to such excise taxes from the "gross proceeds of sales", on which sales taxes are computed.

The respondent has prevailed in both the Chancery Court of Hinds County, Mississippi, and in the appeal taken from that decision by petitioner to the Mississippi Supreme Court which, as petitioner has indicated, denied Mr. Gurley's petition for a rehearing.

SUMMARY OF ARGUMENT

I

THE APPLICABLE STATUTES PLACE THE LEGAL INCIDENCE OF BOTH THE UNITED STATES AND MISSISSIPPI GASOLINE EXCISE TAXES UPON THE DISTRIBUTOR AND NOT THE CONSUMER.

The basic argument which petitioner brings to this Court is that both Federal and State gasoline excise taxes are taxes upon the ultimate purchaser or consumer of gasoline, and therefore, should not be included in the sale price from which state sales taxes are computed.

The first point made by respondent is that the language of the applicable statutes, in themselves, show that the excise taxes are legally placed upon the distributor or producer and not upon the seller or consumer.

The applicable Federal statute is Title 26, Chap. 32, *United States Code*, Sec. 4081 and the succeeding sections.

In answer to the contention of petitioner that legislative intent was to tax the consumer, respondent quotes the reply to that same argument contained in the opinion of the

Illinois Supreme Court in *Martin Oil Service, Inc. v. Illinois Department of Revenue*, 49 Ill. 2d 260, 273 N. E. 2d 823, cert. denied, 405 U. S. 923 (1971).

Respondent believes that the authorities therein clearly overcome the references urged by petitioner as indicating legislative intent that the Federal statute be considered a tax upon the consumer.

We argue, as has been found both by the Illinois and Mississippi Courts, among others, that the excise tax places no liability on the purchaser-consumer if it is not remitted by the producer and that it is totally illogical to argue that the legal incidence of the tax is on one person while only another can be called upon to pay it.

The Mississippi statute in question is *Miss. Code Ann.* Section 27-55-11 (1972) which, by its very language, places the excise tax upon the privilege of the distributor who imports it into Mississippi at the time when, and at the point where, such gasoline enters the state.

The administration of this law was described by a witness in the trial court. He said that the Mississippi State Tax Commission collects the tax from the producer or importer without reference to what use, if any, he may later make of it.

Thus, the importer or distributor is liable for the tax long prior to any sale he may make to a consumer, and the fact that he may increase his price to the consumer because of his liability to pay the excise tax is merely one of many of his costs which are reflected in the ultimate price.

II

THE DECISION OF THE MISSISSIPPI SUPREME COURT IN THIS CASE IS IN ACCORD WITH THE APPLICABLE PRECEDENTS OF THE SUPREME COURT OF THE UNITED STATES.

In this point respondent discusses the various decisions of this Court which have announced rules of law applicable to the case at bar.

Lash's Products Co. v. United States, 278 U.S. 175, 49 S.Ct. 100 73 L.Ed. 251 (1929), held that a tax upon the manufacturer of soft drinks equivalent to 10% of the price for which the drinks were sold is a tax laid and remaining on the manufacturer and on him alone. In that case a unanimous Court held that phrase "pass the tax on" is inaccurate and that the purchaser does not pay the tax although he may pay more for the goods because of the tax.

The Court then decided *Wheeler Lumber Co. v. U. S.*, 281 U. S. 572, 5 S.Ct. 419, 74 L. Ed. 1074 (1930), in which federal tax on the transportation of lumber, which in that case was sold to counties, did not constitute a tax upon the immune consumer but a tax only on the non-exempt seller, again emphasizing that the economic burden does not determine the legal incidence of tax.

In 1931 this Court decided *Indian Motorcycle Company v. United States*, 283 U.S. 570, 51 S.Ct. 601, 15 L.Ed. 1277, (1931) which is cited by petitioner in support of his position here. That case held that a federal tax on the manufacture or import and sale of motorcycles could not be collected from a city purchasing such a motorcycle

because it was a tax upon the sale itself. This decision was that of a divided Supreme Court in which the dissenting opinion thought the decision violative of the principle announced in the earlier two cases cited above.

Another case of the same era, also relied upon heavily by petitioner here, is *Panhandle Oil Company v. State of Mississippi, ex rel. Knox*, 277 U. S. 218, 48 S.Ct. 451, 72 L. Ed. 857, 56 A.L.R. 583 (1928), which was a case holding that the State of Mississippi could not collect sales taxes on gasoline sold to the United States Coast Guard because such sales taxes were imposed directly on the purchaser and in that case the United States, as purchaser, was exempt. This also was a split decision, 4 to 3, with a strong dissent by Mr. Justice Holmes.

In 1941 *Alabama v. King and Boozer*, 314 U. S. 162, 62 S.Ct. 43, 86 L. Ed. 1, held that an Alabama sales tax imposed upon contractors who built governmental facilities on a cost plus-fixed-fee basis was properly collected and did not infringe upon federal immunity. The rationale was that such tax was on the contractor and not upon the United States as his customer. In the opinion in this case, the Court specifically held that insofar as the Panhandle Oil Company opinion expressed a different view, the Court held that view no longer tenable.

The respondent submits that this is the critical point here: If the legal incidence is upon the producer or distributor, then such distributor has no right to deduct an amount equivalent to these taxes from the sales price on which sales taxes are computed.

Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 74 S.Ct. 403, 98 L. Ed. 546 (1954), does not, as claimed by peti-

tioner, reaffirm the Panhandle decision. It, in fact, does not mention it and only holds that Arkansas Sales Taxes cannot be imposed on the sale of tractors which are used for and ultimately owned by the United States.

We submit, as held by the Mississippi Court in this case, that *King and Boozer* is the United States Supreme Court case which enunciates the doctrine best applied to the factual situation here under consideration.

III

DECISIONS OF OTHER STATE AND FEDERAL COURTS ARE PERSUASIVE THAT THE EXCISE TAXES IN QUESTION ARE UPON THE DISTRIBUTOR AND NOT THE CONSUMER.

This case is before the Supreme Court of the United States on Writ of Certiorari because there is a division of authority among the states on the very question of interpretation of the Federal Excise Tax statutes which are presented in this review.

While Michigan and Indiana have construed the Federal excise tax as imposed upon the consumer, a number of other state courts have adopted the contrary position, as argued by respondent here.

The Mississippi decision relied heavily upon *Martin Oil Service, Inc. v. Illinois Department of Revenue*, supra, decided in 1971 on which certiorari was denied by this Court in 1972. The factual and legal matters considered in that case were virtually identical to the case at bar. Significant portions of the Martin opinion are quoted in the respondent's brief here because of their complete applicability to the instant problem.

New Jersey adopted the same position in 1973 in *Ferrara v. Director, Division of Taxation*, 2 CCH State Tax Reports, N. J. Para. 200-583 (1973).

Georgia adopted this position in *State of Georgia v. Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E. 2d 224 (Ga. App. Ct.) aff'd. 226 Ga. 883, 178 S.E. 2d 173 (1970), while at the same time holding that because of the particular language of the Georgia State statute, their state excise taxes could not be included in base price for sales tax computation, even though the Federal excise taxes could.

Other state Supreme Court decisions adopting the view advanced by the respondent here are cited from Indiana and Alabama.

There are also federal authorities supporting this view. *United States v. Sharp, Motor Vehicle Comptroller*, 302 F. Supp. 668 (S.D. Miss.1969), was a case decided by a three-judge constitutional court directly holding that the Mississippi Excise or Privilege tax imposed on gasoline dealers is a tax on the distributor and not the consumer and that, even though the economic burden may have fallen upon the Federal Government, it was not entitled to immunity because it was not the taxpayer.

That case cited and relied upon previous opinions of the comptroller General of the United States to the same effect.

The *Sharp* case also relies upon the *King and Boozer* doctrine of the Supreme Court of the United States.

We believe that the petitioner's contention that the distributor collects and holds such taxes for remittance to the

government as a trustee is undermined by the fact that the distributor has an unequivocal obligation to pay them whether or not he collects them from the ultimate consumer; that no liability for non-payment is ever upon the consumer and that the taxing authorities stand as any other creditor of the distributor, and not as the beneficiary of any fiduciary position.

This lack of fiduciary preference was decided by a federal district court in Louisiana in a 1940 decision holding that no special lien existed for the collection of such excise taxes but that the bond and penal provisions were intended to prevent the loss of the tax.

The Ninth Circuit has adopted the same interpretation of such excise taxes as that of the respondent here in the case of *Martin's Auto Trimming, Inc. v. Riddell*, 283 F. 2d 503 (9th C. A. 1960). The Seventh Circuit has likewise adopted the same position in a 1971 case.

A.L.R. annotations are also cited which compile numbers of cases from many jurisdictions on this question. Respondent submits that the preponderance of the factually applicable cases support the affirmation of the decision of the Mississippi Supreme Court.

IV

MISSISSIPPI'S DETERMINATION OF THE LEGAL INCIDENCE OF ITS OWN EXCISE TAX SHOULD BE ACCEPTED AS FINAL BY THE SUPREME COURT OF THE UNITED STATES UNDER ITS CASE LAW.

The rationale for this point derives from the language found in the *King and Boozer* opinion which detailed that

the definition of purchaser within the meaning of the state statute was a question of state law on which only the Supreme Court of Alabama could speak with final authority.

Subsequent decisions of this Court have held: (a) That the determination of the highest court of a state is controlling upon the question as to whether the legal incidence of a tax imposed by state law is upon the vendor or vendee; (b) That Federal Courts may examine the taxing schemes to determine the incidence of tax only for the limited purpose of determining whether the tax affects federal immunity; (c) That even when the constitutional validity of the state scheme is in question, Federal Courts are obligated to give state determinations great effect in their consideration; and (d) That when a state court has made its own definitive determination as to incidence, it will be deemed conclusive if it is a reasonable interpretation of the statute.

Petitioner has cited no factually applicable case to support any assertion that the federal judiciary should set aside the state court's interpretation of the state statute.

It follows that if the state court determination was reasonable, and within its purview, there can be no violation of the constitution of the United States as claimed by the petitioner.

ARGUMENT

POINT 1

THE APPLICABLE STATUTES PLACE THE LEGAL INCIDENCE OF BOTH THE UNITED STATES AND MISSISSIPPI GASOLINE EXCISE TAXES UPON THE DISTRIBUTOR AND NOT THE CONSUMER.

The petitioner in this case vigorously argues, and virtually assumes, that it is the consumer and not the producer upon whom these taxes are placed.

Respondent believes that this court has consistently, except for a brief period of its judicial history, adhered to the rule that the legal incidence of taxes and not the economic burden would guide the Court in determining questions arising from the imposition of taxes.

Before examining, in detail, the cases decided by the United States Supreme Court, which bear upon this question, and persuasive decisions of inferior Federal Courts and State Courts, we would propose to consider the language of the applicable statutes themselves. They are correctly quoted in the constitutional and statutory provisions set forth in petitioner's brief.

Title 26, Chapter 32, *United States Code*, Section 4081 appears in a chapter entitled, "Manufacturers Excise Taxes," and states:

> There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ a gallon.

The petitioner in Point I A. of his argument correctly quotes the succeeding Code Section in which the tax is imposed upon any person who comes into its possession tax-free, such person being defined by the statute as a "producer" for purposes of such tax liability.

There is no doubt that, by virtue of the definitions of the statute, the petitioner, Mr. Gurley, is such a "producer".

The statute makes no reference to the ultimate retail purchaser or consumer, except the provision that requires the producer to pay the tax on gasoline owned by him tax free, even if he uses it himself instead of selling it. 26 *U.S.C.*, Section 4082(c)

The respondent believes that it is unnecessary and inappropriate to resort to any extraneous guidelines for the interpretation of the legal incidence of the tax imposed by this statute for the reason that the language of the statute is clear and unambiguous in itself. The tax liability is simply placed upon the producer, i.e., petitioner, W. M. Gurley.

The petitioner urges in Point I C. of his brief that both the President and the Congress of the United States have indicated an intention to consider this tax as a user tax, placed upon the consumer or retail purchaser. The precise references urged upon this Court, to indicate such legislative intent, were urged upon the Illinois Supreme Court in *Martin Oil Service, Inc. v. Illinois Department of Revenue*, 49 Ill. 2d 260, 273 NE 2d 823, Cert. denied 405 US 923 (1971). To this contention the Illinois Court responded as follows:

> It is urged by Martin that certain congressional references to the gasoline tax show it must be considered a tax whose incidence rests on the consumer. Exemplary of these is the President's Message to Congress May 17, 1965, Report of the House Ways and Means Committee on H. B. 8371 89th Congress First Session (1965) at 1070-71, in which President Johnson said: "reform of the excise tax structure will leave * * * excises on alcoholic beverages, tobacco, gasoline, tires, trucks, air transportation (and a few other user charges and special excises) * * *." (H. R.

Doc. No. 173, 89th Cong., 1st Sess. 3 (1965).) We consider the references to the tax as a "user tax" were not intended to be descriptive of the legal incidence of the gasoline tax. It is not disputed that the ultimate economic burden to the tax rests upon the purchaser-consumer. A practical, nontechnical description of the tax as a "user tax" is explainable, consistently with the legal incidence of the tax being on the producer. The economic burden of the tax has no relevance to the issue before us. *Fischman & Sons, Inc. v. Department of Revenue*, 12 Ill. 2d 253.

So far as the Federal legislative intendment is concerned, it is relevant to notice that a reference of greater and persuasive significance to the incidence of the tax is found in Senate Report No. 367, a report of the Committee of Finance relative to the Federal-Aid Highway Act of 1961. (U. S. Code Congressional and Administrative News, vol. 2, 87th Congress, 1st Session, 1961.) The report, which contains a recommendation by the committee that the gasoline tax be continued at the rate of four cents per gallon, states:

> 'Under present law the Federal tax on gasoline is imposed on the producer, importer or wholesaler distributor of the gasoline and is payable shortly after he makes its sale."

It is noted that, in the opinion from which this Writ of Certiorari arose, the Mississippi Supreme Court endorsed and adopted the reasoning of the Illinois Court in the *Martin* case, supra, and quoted with approval, among other portions of the decision, the following paragraph illustrating the Illinois Court's conclusion that the incidence of the Federal Excise tax fell on the producer rather than the consumer-purchaser:

> The validity of this view can be illustrated by the consideration that if the tax is not paid by the producer he is the only one from whom the government may seek to collect the tax. Significantly, the statute does not impose any liability on the purchaser-consumer if the gasoline tax is not remitted by the producer. It is irreconcilable to say that the legal incidence of the tax is on the consumer-purchaser and to say that he is not liable for the tax period. 49 Ill. 2d at 263, 273 NE 2d at 826 quoted in appendix A to the petition for the Writ of Certiorari at page 30 and may be found at 288 So. 2d at 873.

With respect to the Mississippi gasoline excise tax, its statute is even more explicit in the language used to place the legal incidence of the tax upon the producer (distributor) and not upon the ultimate purchaser or consumer.

Section 27-55-11 of the *Mississippi Code of 1972* clearly sets forth the tax liability of those persons such as petitioner who engage in the business of bringing gasoline into Mississippi for resale by them or others:

> Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor, an excise tax equal to eight cents per gallon all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose. . .
>
> With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and

> the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when, and at the point where, such gasoline is brought into the state.

Other states' statutes interpreted by State and Federal cases, discussed later in this brief and in the petitioner's brief, expressly provide for the excise tax to be passed along to the ultimate user of the fuel. Obviously, no such provision exists in the Mississippi Law, and while the distributor on whom the incidence of the tax rests, may pass the tax along by increasing the price for which he sells the gasoline, he is certainly not legally required to do so.

In fact, as shown by the testimony in the trial court in this cause of Joe Sharp, the Mississippi official charged with the duty of administering and collecting these taxes, tax liability attaches to the distributor or importer at the time the gasoline enters the State of Mississippi. It is immaterial to Mississippi whether, after paying the tax, the distributor sells the gasoline, gives it away, pours it on the ground, or sells it to a retailer or directly to an ultimate consumer (Appendix 72-76).

On January 1, 1970, an amendment became effective by which the provision in the Mississippi statute that had theretofore permitted a gasoline distributor to pass along the tax when he sold the gasoline was removed from the law.

Petitioner cites *Mississippi Code Annotated*, Section 27-55-27 (1972), at page 42 of its brief, and quotes a pertinent part thereof on pages 9 and 10. Certainly, this section makes available a refund to the owner of any sizeable quantity of gasoline, upon which the Mississippi Excise

tax has been paid, in the event that gasoline is lost or destroyed through some catastrophe. The respondent fails to see how such refund provisions strengthen the petitioner's argument, as claimed in his brief. The respondent believes this section merely provides tax relief so that one, who sustained a loss, could, at least, recover the excise tax which constituted a part of the economic cost of the gasoline lost by the claimant.

Certainly, any argument that the state gasoline excise taxes and the state sales taxes are duplicate taxes imposed at the same time must be defeated by the plain statutory language of *Mississippi Code Annotated* 27-55-11 (1972) which states:

> The tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state.

Obviously, the distributor is liable for the tax before he places it in the service station's distribution tank, and if he adds an amount equivalent to the tax for which he is already liable, to the base price of the gasoline before selling it to his customer, he does so by increasing the gross sale price on which he is required by *Mississippi Code Annotated* Section 27-65-3 (g) (1972) to compute, collect and remit sales taxes.

POINT 2

THE DECISION OF THE MISSISSIPPI SUPREME COURT IN THIS CASE IS IN ACCORD WITH THE APPLICABLE PRECEDENTS OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner has advanced several previous decisions of the Supreme Court of the United States which, he contends, support his argument that the ultimate consumer should be construed to be the taxpayer on whom the excise taxes are levied; and accordingly, that the judgment of the Supreme Court of Mississippi should be reversed.

The respondent urges consideration of a number of other United States Supreme Court decisions, as well as those cited by petitioner, to bring into perspective the body of case law laid down by this Court which applies to the present question.

We would first cite *Lash's Products Co. v. United States*, 278 U.S. 175, 49 S.Ct.100 73 L.Ed.251(1929) which was a suit to recover the amount of certain taxes imposed on soft drinks sold by the manufacturer equivalent to 10% of the price for which sold. The tax, in this case, was paid by the petitioner, calculated at 10% of the sum actually received, but the petitioner had notified its customers beforehand that it paid the 10% tax and contended, that in this way, it passed the tax on so that the true price of the goods was the sum received, less the amount of the tax.

Mr. Justice Holmes, speaking for a unanimous court, held:

> The phrase "pass the tax on" is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. . . the purchaser does not pay the tax. He pays, or may pay, the seller more for the goods because of the seller's obligation, but that is all. . .
> The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is part of the price. . .

This Court next considered an imposition of tax question in *Indian Motorcycle Company v. United States*, 283 U. S. 570, 51 S. Ct. 601, 15 L. Ed. 1277 (1931), which is one of the two cases cited by petitioner, at page 20 of his brief, which, he says, support the line of state court decisions contrary to the Mississippi decision now under consideration.

In the *Indian Motorcycle Company* case, supra, a Federal tax on the manufacture or import and sale of motorcycles was collected from a city purchasing such a motorcycle.

A divided Supreme Court held the imposition of the tax in that case a void, unconstitutional imposition of a Federal tax upon a municipal government.

It was argued, in the dissenting opinion, that the decision did violence to the principal announced in *Lash's Products Company v. United States*, supra, as well as the law of the case in *Wheeler Lumber Company v. U. S.*, 281 U. S. 572, 5 S.Ct. 419, 74 L. Ed. 1074 (*1930*). The majority in the *Indian Motorcycle Company* case, supra, cited *Panhandle Oil Company v. State of Mississippi ex rel. Knox*, 277 U. S. 218, 48 S.Ct. 451, 72 L. Ed. 857, 56 A.L.R. 583 (1928), the other case cited and relied upon by petitioner as authority of the Supreme Court supporting the petitioner's position.

Panhandle Oil Company case, supra, was a narrowly defined case, simply holding that the State of Mississippi could not legally collect sales taxes on gasoline sold to the United States Coast Guard and other branches of the United States of America. This case dealt with the direct imposition of sales taxes by a state to be collected from the United States, as purchaser. As pointed out by the

Mississippi Supreme Court in the opinion now being considered by this Court, the *Panhandle* case was a 4-3 decision in which Mr. Justice Holmes wrote a strong dissent asserting that the legal incidence of the tax was on the seller.

An incidence of tax question was next considered by the United States Supreme Court in *Alabama v. King and Boozer*, 314 U. S. 1, 62 S.Ct. 43, 86 L. Ed. 1 (1941). This was a case arising from sales tax imposed by Alabama upon contractors who built government facilities for the United States on a cost plus fixed fee contract. The precise question presented was whether such tax which the seller was required to collect from the buyer infringed any constitutional immunity of the United States from state taxation. This Court held that the tax was not unconstitutional because its legal incidence was on the contractor and not upon the United States as his customer. In this case, Mr. Justice Stone, one of the dissenting Justices in *Panhandle*, said for the majority:

> The asserted right of one to be free of taxation by the other (government against state) does not spell immunity from paying the added cost attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Company v. Mississippi* (supra) and *Graves v. Texas Company*, 298 U. S. 393, 56 S.Ct. 818, 80 L. Ed. 1236, we hold it no longer tenable. 314 U. S. at 9, 62 S.Ct. at 45, 86 L. Ed. at 6.

The petitioner maintains that *King and Boozer*, supra, did not overrule *Panhandle*, apparently despite Mr. Justice Stone's statement in the opinion, and he contends that it only explained that when the economic and not the legal

incidence of a tax fell upon the United States the tax did not violate the Federal Government's immunity from state taxation. This is the very point at issue here: If the legal incidence is upon the producer or distributor to pay the excise taxes, state or federal, does the fact that an equivalent amount is added to the price and the economic burden, thus born by the ultimate consumer, affect whether or not the amount of such tax must be broken out and deducted from gross sales price, for purposes of computing sales taxes. If *Alabama v. King and Boozer*, supra, held, as we believe it clearly did, that question arising from tax liability will be determined by the legal incidence and not the economic burden of such taxes, and petitioner recognizes this, then this Supreme Court case is very important authority for respondent's position and for affirming the Mississippi Supreme Court in this case.

Another older decision of this court, worthy of mention, is the second case cited in the dissent in the *Indian Motorcycle Company* case, *Wheeler Lumber Company v. United States*, supra, a 1930 decision. In that case a tax was imposed on the transportation of lumber under a Federal revenue act of 1917. It was contended that lumber which was sold to a country should be exempt from the imposition of that tax because of the state immunity from federal taxation. There the United States Supreme Court held:

> The tax is not laid on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges. True, it appears that here the transportation was had with a view to a definite sale; but the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. It follows that the tax on the transportation cannot be regarded as a tax or burden on the sale.

> As the tax is not laid on the sale or in any wise measured by it, the case of *Panhandle Oil Company v. Mississippi* . . . is not in point. 281 U. S. 572 at 579, 50 S.Ct. 419 at 421.

We submit that the preliminary tax upon transportation of lumber is entirely analogous to excise tax upon the importation of gasoline into Mississippi, preliminary to its sale.

A subsequent case is advanced by petitioner, that of *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 74 S.Ct. 403, 98 L. Ed. 546 (1954). In that case Arkansas sales tax were imposed on tractors which were purchased by a contractor for the use and ultimate ownership of the United States so that the United States was the true purchaser on whom both legal and economic incidence of the tax fell. It was, of course, held that such tax is not collectible from an immune federal government. The petitioner has asserted throughout this litigation *Kern-Limerick*, supra, "reaffirmed the *Panhandle decision*" (petitioner's brief page 23).

On the contrary, we believe that Judge Rogers writing for the Mississippi Court in the opinion here under attack, was eminently correct in response to the contention of petitioner:

> Contrary to appellant's assertions, the Kern-Limerick case does not specifically cite Panhandle in support of its decision, nor does it seem to change the effect of the King and Boozer decision. The reason the Court reached a different result in Kern-Limerick was that it found that the economic burden *and* the legal incidence of the tax fell on the United States, whereas in King and Boozer, the Court found that although the economic burden of the tax was on the United States, the legal incidence of the tax fell on the contractor. Therefore, the appellant's contention that the Panhandle case was revived by Kern-Limerick must fail, since the Court still holds that where only the economic burden (and not the legal incidence) of a tax falls on the United States, the doctrine of sovereign immunity is not applicable. (appendix A to petition for Certiorari page 28; 288 So. 2d at 872).

POINT 3

DECISIONS OF OTHER STATE AND FEDERAL COURTS ARE PERSUASIVE THAT THE EXCISE TAXES IN QUESTION ARE UPON THE DISTRIBUTOR AND NOT THE CONSUMER.

It is recognized that a number of state excise taxes have been construed by state courts to be taxes upon the consumer and thus, not includible in the sales tax base and that some state courts have construed the federal excise tax likewise. Other state and federal courts have construed the federal excise tax, and state excise taxes, as legally imposed upon the distributor and thus, not deductible from the sales tax base as did Mississippi in this case. It is this conflict of authority, obviously, which has brought this question to this Court.

The respondent recognizes that the Michigan and Indiana courts have construed the federal excise tax as imposed upon the consumer as set forth in Point I B. of the petitioner's brief (pages 28-29).

On the contrary a number of other state courts, in decisions which we recommend as well reasoned, have to the contrary adopted the position taken by the respondent in this case.

Mississippi relied heavily upon *Martin Oil Service, Inc. v. Illinois Department of Revenue*, supra, which was decided by the Illinois Supreme Court in 1971 and on which Certiorari was denied by this Court in 1972. In that case, Martin operated 2 wholesale and 43 retail gasoline outlets in Illinois. He was licensed by the United States for payment of the federal excise tax, just as Gurley is licensed for that purpose. He contended that the federal gasoline tax should not be included in gross receipts for the purpose of computing the Illinois Retailers Occupation tax which corresponds to Mississippi Sales tax, alleging the legal incidence of the federal tax was on the consumer-purchaser. Because of the similarity of the facts and the importance which both the respondent and the Mississippi Court have placed upon the *Martin* case, we quote at length from its opinion, regarding the incidence of the federal gasoline excise tax:

> This question appeared before this Court in 1936, when in *People v. Werner*, 364 Ill. 594, it was said that the legal incidence of the Federal gasoline tax rested on the producer. Martin, to avoid the force of *Werner*, argues that the legal incidence of the tax was there stipulated by the parties. It is true that *Werner* was decided on a stipulation of facts. We cannot find however, any suggestion that the question of the legal incidence of the tax was part of the stipulation. Rather it seems clear that this Court's expression that the legal incidence of the tax rests on the producer was based on its analysis of the Federal statute.
>
> As Martin points out at least one jurisdiction has taken a position opposed to *Werner*. The Supreme Court of Pennsylvania in *Tax Review Board v. Esso Standard Division of Humble Oil and Refining Co.*, 424 Pa. 335, 227 A. 2d 657, cert. denied, 389 U.S. 824, 19 L. Ed. 79, held that the

legal incidence of the tax is on the purchaser-consumer. Decisions of two other States are read by Martin as supporting its thesis that the tax incidence is on the purchaser-consumer. It was held in *Standard Oil v. State* (1937), 283 Mich. 85, 276 N. W. 908, and *Standard Oil Co. v. State Tax Commissioner* (1941), 71 N.D. 146, 299 N. W. 447, that on sales from producer retailers to consumers the Federal gasoline and State sales taxes were taxes that were to be simultaneously imposed. Those Courts concluded from this that the Federal tax should not be included in the "gross receipts" for the purpose of computing the State tax. Neither case considered the question of on whom the legal incidence of the Federal tax falls. We would observe that other Courts have reached the same conclusion this Court did in *Werner*. It was held in *Sun Oil Co. Gross Income Tax Division*, 238 Ind. 111, 149 N.E. 2d 115, by the Supreme Court of Indiana and in *State v. Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E. 2d 224, aff'd 226 Ga. 883, 178 E.E. 2d 173, by the appellate court of Georgia that the legal incidence of the Federal tax rests upon the producer. The Supreme Court of Indiana relied importantly on *People v. Werner*, in its determination. We consider after reviewing these cases that *Werner* correctly judged that the incidence rests on the producer. The validity of this view can be illustrated by the consideration that if the tax is not paid by the producer, he is the only one from whom the government may seek to collect the tax. Significantly the statute does not impose any liability on the purchaser-consumer if the gasoline tax is not remitted by the producer. It is irreconcilable to say that the legal incidence of the tax is on the consumer purchaser and to say that he is not liable for the tax. Referring to our decision in *American Oil Co. v. Mahin*, No. 43376, where we held that the incidence of the

> Illinois Motor Fuel Tax is on the consumer, we note that the statute there examined provides that the tax may be recovered from the consumer-purchaser if it has not been collected by the retailer.

Martin then contended as does Gurley in the instant case that because certain consumers of gasoline can secure refunds or credit for gasoline tax paid, the incidence of the tax was upon the consumer-purchaser rather than upon the producer-distributor. The Illinois Court disposed of this contention as follows:

> Another contention of Martin is that because amendments to the gasoline statute provide that certain consumers of gasoline can secure refunds of the gasoline tax paid, it must have been the legislative intent that the consumer-purchaser would bear the legal incidence of the tax. It is pointed out that in *Chicago Motor Club v. Kinney*, 329 Ill. 120, the Court said that a tax refund to a person who has not directly or indirectly paid the tax would be unconstitutional, and thus, Martin argues, as certain consumers can secure a refund, the incidence of the tax must be on the consumer-purchaser.
>
> We consider that the argument has only superficial validity when measured against the very convincing evidence of a contrary legislative intention, including the statement of the Committee on Finance that the Federal gasoline tax was imposed "on the producer, importer, or wholesale distributor of the gasoline". The amendments upon which Martin relies provide that the purchaser-consumer can obtain payment in full of the Federal gasoline tax, that is, four cents per gallon, if the gasoline has been used on a farm for farming purposes (26 U. S. C. Sec. 6420 (a) and half of the tax payment, that is, two cents a gallon,

> if the gasoline has been used for other non-highway purposes (26 U. S. C. Sec. 6421 (a) or by the local transit systems (26 U. S. C. Sec. 6421 (b).
>
> We consider that these payments by the Federal government are not refunds in a technical sense but rather allowances to certain consumer-purchasers based on a recognition that the economic burden of the gasoline tax falls on the ultimate consumer. The gasoline tax proceeds are used to provide Federal finances for highway support.

Petitioner's argument in the instant case adopted Martin's second major contention in toto to the effect that if the legal incidence of the tax should be on the producer rather than the consumer, sales made to consumers by one who is a producer-retailer, as is petitioner and as was Martin, should be distinguished from sales made by one who is simply a retailer, and sales by the producer-retailer should be exempt from sales tax. Martin cited *Standard Oil v. State*, supra, and *Standard Oil Company v. State Tax Commissioner*, supra, as does petitioner. The Illinois Court disposed of this contention with the following reasoning which we believe valid and sound:

> In *Standard Oil Co. v. State*, 283 Mich. 85, 276 N. W. 908 and *Standard Oil Co. v. State Tax Commissioner*, 71 N. D. 146, 299 N. W. 447, Michigan and North Dakota adopted the position Martin would have us take. As expressed by the Supreme Court of Michigan the rationale of this position is that since the two taxes attach simultaneously, the Federal gasoline tax should not be considered a part of the sales price but as a fund which is payable by the producer to the Federal government.
>
> The Department's response is that if Martin's argument is accepted it would result in the

Federal tax of four cents per gallon being included in the computation of the Illinois tax on sales by retaliers who are not also producers and excluded in the case of producer-retailers. This would typically result in the cost of gasoline to a consumer who purchases from a non-producer retailer being greater than to one who purchases from a producer-retailer and would economically discriminate against non-producer retailers. It would violate, argues the Department, the Illinois constitution and the equal protection clause of the United States constitution.

The retailers occupation tax in Illinois is imposed on a retailer's "gross receipts" (Ill. Rev. Stat. 1969, Ch. 120, Par. 441). "Gross Receipts" are the "total selling price" or the "amount of such sales". (Ill. Rev. Stat. 1969, Ch. 120, Par. 440) "Selling price" or "amount of sale" is defined as the "consideration for a sale". (Ill. Rev. Stat. 1969, Ch. 120, Par. 440).

The question therefore is whether when the producer-retailer passes on the cost to him of the Federal gasoline tax in the form of a higher price to the consumer, the amount by which the price is thus raised to compensate the producer-retailer can be said to be part of the consideration he receives upon the sale of the gasoline.

. . . The legal incidence of the Federal gasoline tax is on the producer, who is under no legal duty to pass the burden of the tax on to the consumer. If he does pass on the burden of the tax it is simply done by charging the consumer a higher price. This higher price is the result of the added cost, because of the burden of the Federal tax, to the producer in selling his gasoline. It is not different from other costs he incurs in bringing his product to market, including the

costs of raw material, its processing and its delivery. All these costs are includable in his "gross receipts," or the "consideration" he receives for his gasoline.

No reason has been given by Martin why the cost of the gasoline tax should be regarded differently from the other costs of the producer-retailer and we perceive none.

New Jersey has recently adopted the same position with respect to Federal excise taxes in the case of *Jerry M. Ferrara v. Director, Division of Taxation*, 2 CCH State Tax Reports, N. J., Para. 200-582 (1973). In dealing with this precise question, the New Jersey Court said:

The petitioner contends that for the State to include as "gross receipts" the State and Federal Excise tax is arbitrary, oppressive and illegal. The issue is further narrowed to the determination of upon whom the legislature and congress imposed the respective taxes. If the aforesaid excise taxes are imposed upon the consumer, and the retailer and distributor is merely a "collector" for the respective governments involved, then the excise taxes collected should not be included in the gross receipts.

However, if the taxes are imposed on the retailer or distributor, then the entire price paid by the ultimate consumer, including all excise taxes paid, should be included in the petitioner's "gross receipts." . . .

The Federal statute clearly and unambiguously imposes the tax on the producer (which includes distributor) of the gasoline and not on the ultimate consumer. Liability for the payment of the tax rests solely upon the producer and nowhere

is there any provision for any liability upon the ultimate consumer for the producer's failure to pay the tax.

The fact that the amount of the tax is added to the selling price and ultimately paid for the final purchaser does not constitute the latter as the taxpayer.

All taxes in effect are paid for by the ultimate consumer, but this does not mean the consumer is personally liable for the tax or is the taxpayer.

All producers, manufacturers, distributors, and retailers are subjected to taxes of one form or another, including real estate and personal property taxes, which are calculated in their costs and added to the purchase price and "passed on" to the ultimate consumer. However, the words "passed on" are technically inaccurate in that the legal incidence of the aforesaid taxes are not on the consumer and he is not personally liable for the payment of said taxes. . .

> Accordingly, it is the conclusion of this Division that the Federal Excise tax should be included in the gross receipts of the petitioner.

The New Jersey Court went on to make the same decision with respect to New Jersey motor fuels tax (a state excise tax).

A ruling to the same effect with respect to the Federal excise tax, and interestingly illustrative of statutory distinctions in the state excise taxes, is the case of *State of Georgia v. Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S. E. 2d 224 (1970) aff'd 226 Ga. 883, 178 S. E. 2d 173 (1970). It was held in that case that the Federal tax is imposed on gasoline sold by the producer, and is not imposed on the sale made to the consumer. Thus, a gasoline dealer in calculating his sales tax must include as a part of the retail selling price the amount of the Federal excise tax. The Georgia Court held, however, that the amount of the Georgia motor fuel tax need not be included in the retail sales price base since this tax is imposed upon the sale to the consumer. The Georgia Court said there is no prohibition against absorption of the Federal excise tax by the seller but there is a prohibition against absorption of the state imposed tax.

This case supports the respondent's position regarding the Federal excise tax in this case and, by inference, the Mississippi and Illinois position with respect to state excise taxes since they, unlike the Georgia tax, are placed upon the producer-distributor and not required to be collected from the consumer as in Georgia.

Other state court decisions holding that the legal incidence of such gasoline excise taxes is on the distributor and therefore, includible in the base for sales tax purposes, include *Sun Oil Co. v. Gross Income Tax Division*, 238 Ind. 111, 149 N. E. 2d 115 (_____) and *Pure Oil Co. v. State of Alabama*, 244 Ala. 258, 12 So. 2d 861, 148 A.L.R. 260 (1943).

A number of inferior Federal courts have taken the view adopted by Mississippi in this case. The precise question involved here, relative to the incidence of the Mississippi gasoline excise tax, was decided by a three judge constitutional court in *United States v. Sharp, Motor Vehicle Comptroller*, 302 F.Supp.668 (1969 S.D.Miss., 1969). In that case, United States sought an adjudication of the three-judge court that the Mississippi privilege tax imposed on gasoline distributors was a tax upon the consumer of such gasoline and that, therefore, since the tax

had been paid on gasoline purchased by the government, it was entitled to refund under its immunity from state taxation. Likewise involved was a charge of discriminatory application of exemptions of governmental entities from payment of the gasoline tax which is not pertinent here. Judge Dan Russell speaking for the panel disposed of this contention in the following language:

> . . . We do not quarrel with the contention that a statute's practical operation and effect determines where the legal incidence of the tax falls. We simply agree that the tax burden in the Mississippi statute falls plainly and squarely on the distributor, to whom the state looks for the payment of the tax, albeit the amount of the tax may ultimately be borne by the vendee, in this case the federal government.

. . . Hence we find that Mississippi's gasoline tax is not such a tax to afford immunity to the plaintiff, except when it has received specific exemptions such as for gasoline used by the armed forces of the United States. As stipulated, this exemption has been in effect throughout the period of this claim and is now in effect by Section 10013-39 of the Mississippi statutes.

In sum, the Court finds as a fact that the tax in suit at all times was levied and assessed against and collected by the State of Mississippi from a gasoline distributor, duly qualified under its laws, and never collected any such tax in suit (directly or indirectly) from the United States or any of its agencies; and that the defendant never discriminated against the Plaintiff in any manner in its administration of said privilege or excise tax law, according to the undisputed evidence and testimony in this case.

The Court in the Sharp case, supra, pointed out, in its opinion, that the Comptroller General of the United States had rendered an opinion both in 1942 and in 1944 which found that the legal incidence of the Mississippi gasoline tax and that imposed by seven other states having similar statutes, falls on the vendor rather than the vendee. This opinion states that the decision of the United States Supreme Court in *Alabama v. King and Boozer*, supra, leaves no room for doubt that a vendor who sells supplies to the United States is not, merely because of the immunity of the Federal Government from state taxation, exempt from payment of a state tax imposed unless the legal incidence of that tax is upon the vendee.

The petitioner here has asserted that the producer-distributor acts only as a trustee for the Federal or state taxing authorities in the collection and remittance of the excise taxes, a concept for which the only authority offered is a district court decision relating to jewelry excise taxes.

We submit that a Louisiana District Court decision has held that the obligation of a taxpayer to pay state excise taxes is simply a general obligation of that distributor and that the state has no superior lien against the corporate assets on the basis of such a trust theory. *State of Louisiana v. Atlas Pipe Line Corporation*, 33 F. Supp. 160 (D.C. La., 1940), contains this holding:

> . . . Nowhere do I find any provision for a lien of any sort. On the contrary, the requirements, such as giving of bond, making reports and penal provisions, were intended to prevent the loss of the tax through the obviously easy mean of disposing of it or consuming the gasoline. The dealer is liable for the tax whether he collects an amount sufficient to cover it from those to whom he sells or not.

Respondent's position in this case was set forth as a correct interpretation of the law in the Ninth Circuit in *Martin's Auto Trimming, Inc. v. Riddell*, 283 F. 2d 503 (9th C.A. 1960). In that case the plaintiff sought to obtain a return of manufacturing taxes later passed on to consumers. The Court said.

> Appellants main reliance is placed on *Indian Motorcycle Company v. United States*, 283 U.S. 570, 51 S.Ct. 601, 15 L. Ed. 1277 (1931), *Standard Oil v. United States*, 130 F. Supp. 821. . .
>
> It is obvious the Appellant has misread the effect of the decisions in these cases. None of these cases hold that the excise tax is imposed upon the purchaser. All of those cases hold that the tax is the obligation of the manufacturer when the product is sold. The excise tax in question on this appeal is the tax which was imposed upon sales by Appellant during the period mentioned. (P. 505)

This doctrine was also adopted by the Seventh Circuit in 1971 in *Agron v. Illinois Bell Telephone Company*, 449 F. 2d 906 (7th C. A. 1971), in which the Circuit Court cites and quotes from the opinion on *Lash's Products Company* case with respct to the legal incidence of Illinois taxes on communications services. The Circuit Court held that, even though additional charges imposed on Agron and other telephone subscribers may be directly attributed to state and local taxes paid by Illinois Bell, those additional charges are nevertheless a part of the price IBT demands for its services. Accordingly, they are held properly a part of the base for computation of federal excise taxes. The Court stated:

> "It may be that IBT normally "passes on" to its subscribers the economic burden of the state and

> local occupation taxes, just as every item of operating expense — including state and federal taxes — if it is to operate profitably. But the fact that the telephone subscriber ultimately bears the financial burden of the tax does not justify our ignoring the clear language of the Illinois statute and holding that the tax is "imposed" on subscribers.

Additionally, support for this view from various state jurisdictions can be found in cases dating back for many years. An annotation appears in *148 A.L.R. 263* at the conclusion of the opinion there reported of the case of *Pure Oil Co. v. State of Alabama*, 244 Ala. 258, 12 So. 2d 861 148 A.L.R. 260 (1943). This annotation was supplemented in *174 A.L.R. 1263*. We believe that the great preponderance of the factually applicable cases in those annotations support the respondent's positions here.

POINT 4

MISSISSIPPI'S DETERMINATION OF THE LEGAL INCIDENCE OF ITS OWN EXCISE TAX SHOULD BE ACCEPTED AS FINAL BY THE SUPREME COURT OF THE UNITED STATES UNDER ITS PRIOR CASE LAW.

There is no doubt that the Supreme Court of Mississippi has determined the legal incidence of both the Federal and Mississippi gasoline excise taxes to fall upon the producer-distributor; the Court so decided in the decision being reviewed here. Respondent respectfully submits that, except where the issue of Federal immunity from taxation is raised, Federal Courts, including the Supreme Court of the United States, have considered themselves bound by state court determinations of the incidence of state taxing

schemes. Questions of construction of state statutes have always been within the province of State Supreme Courts, as evidenced by the following language of this Court in *Alabama v. King and Boozer*, supra:

> The taxing statute, as the Alabama Courts have held, makes the "purchaser", liable for the tax to the seller who is required "to add to the sales price" the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or credit. Who, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. (Page 9-10)

In addition, the decision of the Supreme Court of the United States in the case of *Federal Land Bank of St. Paul v. Bismarck Lumber Company*, 314 U.S. 95, 62 S.Ct. 1, 86 L. Ed. 65, is direct authority for the proposition that the determination of the highest Court of the state is controlling upon the question as to whether the legal incidence of a tax imposed by a law of that state is upon the vendor or the vendee. See also *United States v. Sharp*, 302 F. Supp. 668 (S. D. Miss. 1969).

It is only when the question of federal immunity is raised that federal courts may examine the taxing schemes to determine the operating incidence of the tax, as is evidenced by the following language from *Society for Savings v. Bowers*, 349 U. S. 143, 75 S.Ct. 607, 99 L. Ed. 950 (1955)

> Because the question here is whether the tax affects federal immunity, it is clear that *for this limited purpose* we are not bound by the State Court's characterization of the tax. (Emphasis added)

See also *Agricultural National Bank v. State Tax Commission*, 392 U. S. 339, 88 S.Ct. 2173, 20 L. Ed. 2d 1138 (1968). But it is apparent that even where the constitutional validity of the state's scheme is in question, Federal Courts are obligated to give State determinations great effect in their consideration. In *American Oil Company v. Neill*, 380 U. S. 451, 85 S.Ct. 1130, 14 L. Ed. 2d 1 (1965), the Court said:

> When a State Court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining the natural effect of the statute, and if it is consistent with the statute's reasonable interpretation, it will be deemed conclusive.

Petitioner argues in Point I E. that the Mississippi taxing arrangement is a tax on one person's property or income by reference to the property or income of another and therefore, contrary to the due process guaranties of the Fourteenth Amendment. The single case cited by the petitioner is not factually comparable in any way to the case at bar.

In light of the authorities cited above in this point, it seems evident that the determination of whether or not a state interpretation of the legal incidence of its own tax will not offend the Constitution of the United States nor be disturbed by Federal Courts unless federal immunity is involved or the statute has been unreasonably interpreted.

CONCLUSION

The petitioner posed three questions in the beginning of his brief. To the first, we believe that the foregoing au-

thorities clearly weigh in favor an interpretation that both Federal and State Excise taxes on gasoline are imposed upon the distributor-producer and not upor the purchaser.

The second question of petitioner asked whether or not state sales tax on federal excise tax violates the Fifth and Fourteenth Amendments of the Constitution of the United States and violates the Federal Government's immunity from taxation by a state. We believe that this question, to some extent, begs the question or presumes that such excise taxes are only collected by the dealer from the taxpayer and held in trust in the nature of withholding taxes. Since the authorities presented in this brief are manifest that such an interpretation of excise taxes is not correct the question is, we submit, more accurately stated in the respondent's brief as whether or not the refusal of Mississippi to permit such a dealer to deduct an amount equal to the Federal excise taxes from the gross proceeds sales tax base violates either those constitutional provisions or the federal immunity. We believe that this brief, and certainly the opinion of the Mississippi Supreme Court, have persuasively shown that, under the authority of *Alabama v. King and Boozer*, supra, and the other cited authorities, this question must be answered that such taxing arrangement is not violative of either the Federal Constitution or federal immunity.

The third question posed by the petitioner is virtually the same as the second except with respect to Mississippi excise taxes while the second question dealt with Federal excise taxes. For all of the same reasons, plus the legally conclusive nature of the state court's determination of state law, the answer to that question must be likewise.

Respondent respectfully submits that the decision of the

Mississippi Supreme Court in *Gurley v. Rhoden* should be affirmed by the Supreme Court of the United States.

Respectfully submitted,

ARMY RHODEN,
COMMISSIONER, CHAIRMAN
OF THE STATE TAX
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OF MISSISSIPPI, RESPONDENT

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By: .....
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Hunter M. Gholson, one of the counsel for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of January, A.D., 1975, I served copies of the foregoing Respondent's Brief to the Supreme Court of the United States on all parties required to be served, by depositing a copy of said Brief in the United States Post Office properly addressed, with first class postage prepaid, to Mr. Walter P. Armstrong, Jr. and Hubert A. McBride, 15th Floor Commerce Title Building, Memphis, Tennessee 38103; and Charles R. Davis, David H. Nutt and Thomas W. Tardy, III, 507 First National Bank Building, Post Office Drawer 1532, Jackson Mississippi 39205, Counsel for Petitioner.

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HUNTER M. GHOLSON